

**United States Department of Labor
Employees' Compensation Appeals Board**

S.S., Appellant

and

**DEPARTMENT OF DEFENSE, DEFENSE
COMMISSARY AGENCY, Dover, DE, Employer**

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**Docket No. 07-2189
Issued: March 20, 2008**

Appearances:

*Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 24, 2007 appellant filed a timely appeal from May 14 and August 10, 2007 decisions of the Office of Workers' Compensation Programs that denied modification of a December 18, 2006 decision denying appellant's occupational disease claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant met his burden of proof in establishing that he developed an occupational disease in the performance of duty.

FACTUAL HISTORY

On October 23, 2006 appellant, then a 49-year-old meat cutting worker, filed an occupational disease claim alleging that he developed bulging discs, disc desiccation, central tear and bilateral neural foraminal narrowing, resulting in chronic low back pain, in the performance of duty. He attributed his condition to repetitive bending, lifting and reaching from awkward positions while working on a "single meat grinder system without a molder and conveyor belt."

Appellant stated that he first realized his condition on September 13, 2006. He stopped work on September 13, 2006 and returned to a light-duty assignment on October 26, 2006.

Appellant submitted a September 13, 2006 report from Dr. Roy E. Bands, Jr., a Board-certified orthopedic surgeon, diagnosing degenerative lumbar discs. In a September 12, 2006 lumbar magnetic resonance imaging (MRI) scan report, Dr. Amarnath Sortur, a Board-certified radiologist, diagnosed focal left paracentral disc bulge at T12-L1, central annular tear with generalized disc bulge and bilateral neural foramen narrowing at L3-4, board-based disc bulge with bilateral moderate neural foramen stenosis and bilateral facet arthritis at L4-5 and a small focal central bulging disc at L5-S1. On October 25, 2006 Dr. Bands noted treating appellant for lumbar stenosis. In an undated note he stated that appellant sustained “repetitive lower back strain at work,” which “created degenerated discs.”

In a September 13, 2006 narrative, Dr. Bands stated that appellant’s work as a meat cutter was “relatively laborious” and that appellant reported “having quite a bit of difficulty at his strenuous job.” He noted appellant’s complaints of gradually worsening back pain and found that although appellant’s MRI scan showed disc degeneration, disc space collapse and some foraminal stenosis at L3-4 and L4-5, his physical examination was essentially normal. Dr. Bands diagnosed severe disc degeneration and foraminal stenosis at L3-4 and L4-5 and lumbar radiculopathy.

Appellant also provided a “statement of events and circumstances” and an additional undated statement further detailing his job responsibilities. He attributed his more frequent aches and pains, which began in 2004, to a change in the manner in which his job was performed. Appellant also noted that he was in a motor vehicle accident in 2006 but was not injured. He submitted August 31 and December 5, 2006 notes from Elizabeth Sipala, a nurse practitioner, who stated that appellant’s chronic back pain was employment related and a December 1, 2006 report from Jackie Mathwich, a physical therapist.

In a September 25, 2006 “hazard report,” the employing establishment’s safety inspector explained that the single grinder system in use was outdated and “less ergonomic” than the double grinder system. The safety inspector noted that the single grinder system “involves more man hours with the possibility to cause serious back injury to an employee who operates this grinder by repetitive bending and lifting for a long period of time” and that the employing establishment needed to change this particular machine to prevent injury to employees. In an October 11, 2006 memorandum the employing establishment noted that, after it changed the way that appellant’s work was performed, it had provided him with a stool as a “temporary ergonomic aid,” but that he declined to use the stool.

On December 18, 2006 the Office denied appellant’s occupational disease claim on the grounds that the medical evidence did not establish a causal relationship between his diagnosed condition and employment factors.

On April 17, 2007 appellant requested reconsideration. With his request, he provided a March 12, 2007 report from Dr. Richard I. Zamarin, a Board-certified orthopedic surgeon, who noted appellant’s complaints of moderate intermittent back pain and referenced appellant’s factual statements concerning his work activities. Upon physical examination Dr. Zamarin found

some tenderness in the lumbar and thoracic paraspinal areas. He also noted the results of appellant's September 12, 2006 lumbar MRI scan. Dr. Zamarin explained that he considered appellant's degenerative changes to be more severe than normal for his age and concluded that his work activities had permanently aggravated his degenerative disc disease. He diagnosed "thoracic and lumbar sprain and strain with an underlying annular tear at L3-4 and neural foraminal narrowing, a broad based bulge, neural foraminal stenosis and facet arthritis at L4-5 and L5-S1." Dr. Zamarin opined that "the many years of heavy physical and repetitive work" performed by appellant as described in his statement of events and circumstances, "has permanently aggravated the degenerative disc disease in his thoracic and lumbar spine for his age." He concluded that "more likely than not, [appellant's] employment contributed to his condition by both aggravating and accelerating it."

By decision dated May 14, 2007, the Office denied modification on the grounds that the medical evidence of record, including Dr. Zamarin's March 12, 2007 report, was insufficient to establish a causal relationship between appellant's diagnosed condition and his employment factors.

On May 16, 2007 appellant requested reconsideration. He asserted that Dr. Zamarin's references to his statement established that the physician considered the employment activities listed therein when opining that his job activities caused or aggravated his condition. Appellant also argued that Dr. Zamarin's statement that his condition was "more likely than not" caused or aggravated by his employment was not speculative or equivocal. In support of his reconsideration request, appellant provided a May 9, 2007 work capacity evaluation from Dr. Zamarin, stating that appellant had permanent work restrictions.

In an undated memorandum, the employing establishment noted that it had offered appellant accommodations, including a chair, to assist with his back problems, but that he declined. In a July 1, 2007 response, appellant stated that the accommodations offered by the employing establishment were unsafe and noted the employing establishment's hazard report.

On July 6, 2007 the Office referred appellant, along with a statement of accepted facts, to Dr. Robert Allen Smith, a Board-certified orthopedic surgeon, for a second opinion examination.

In an August 7, 2007 report, Dr. Smith noted that appellant attributed his back pain to an ergonomically outdated meat grinder. He stated that there was "no question" that appellant's job involved "heavy work" and that the meat grinder system used by the employing establishment was out of date. On physical examination, Dr. Smith found satisfactory spinal range of motion and no soft tissue abnormalities. He also noted that appellant's neurologic examination was objectively normal. Although Dr. Smith indicated that appellant's MRI scan showed degenerative disc disease and some bulging discs, he noted that "of significance is the fact that pre and paravertebral soft tissues all appear to be normal." He noted that, although Dr. Bands found some tenderness in the lumbar spine, this was not supported by objective findings. Dr. Smith noted that Dr. Zamarin's examination was also essentially normal. He diagnosed degenerative disc disease and concluded that appellant's condition was normal for his age. Although Dr. Smith acknowledged that it was possible appellant might have sustained work-related sprains and strains over the years, he emphasized that appellant's MRI scan, which showed what he considered to be age-related arthritis, did not support that appellant's condition

was work related. He concluded that appellant's degenerative disc disease was preexisting and longstanding and opined that it was neither caused nor aggravated by appellant's employment. Dr. Smith also provided an August 7, 2007 work capacity evaluation noting that while appellant had permanent physical restrictions, they were unrelated to his employment.

By decision dated August 10, 2007, the Office denied modification of its previous decisions on the grounds that the medical evidence of record did not establish a causal relationship between appellant's diagnosed condition and his employment factors.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disabilities and/or specific conditions for which compensation is claimed are causally related to the employment injury.² These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.³

An occupational disease or injury is one caused by specified employment factors occurring over a longer period than a single shift or workday.⁴ The test for determining whether appellant sustained a compensable occupational disease or injury is three-pronged. To establish the factual elements of the claim, appellant must submit: "(1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying the factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the factors identified by the claimant."⁵

The medical evidence required to establish causal relationship generally is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.⁶ The opinion of the physician must be based on a complete factual and medical background of the

¹ 5 U.S.C. §§ 8101-8193.

² *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁴ *D.D.*, 57 ECAB ____ (Docket No. 06-1315, issued September 14, 2006).

⁵ *Michael R. Shaffer*, 55 ECAB 386, 389 (2004); citing *Lourdes Harris*, 45 ECAB 545 (1994); *Victor J. Woodhams*, *supra* note 3.

⁶ *Conard Hightower*, 54 ECAB 796 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000).

claimant⁷ and must be one of reasonable medical certainty⁸ explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁹

ANALYSIS

The Board finds that appellant did not meet his burden of proof in establishing that he developed an occupational disease in the performance of duty. While appellant established that he performed certain repetitive physical activities at work, he did not provide rationalized medical evidence establishing that work factors caused or aggravated a diagnosed condition.

In support of his occupational disease claim, appellant submitted reports from Dr. Bands, who diagnosed degenerative disc disease and opined that appellant's "relatively laborious" job caused or aggravated his condition. In his undated note, Dr. Bands stated that appellant sustained "repetitive lower back strain at work," which "created degenerated discs," but did not identify the factors of employment which he believed caused or contributed to appellant's condition or give rationale to support his conclusion. On September 13, 2006 he characterized appellant's job as "relatively laborious" and "strenuous," but noted that his physical examination was essentially normal and did not discuss the specific factors of employment that he believed caused appellant's condition or present detailed reasoning to support his opinion that appellant's condition was work related. Accordingly, the Board finds that Dr. Bands' reports are not sufficiently rationalized to support causal relationship between a diagnosed condition and specific employment factors.

Appellant provided reports from Dr. Zamarin. In his March 12, 2007 report, Dr. Zamarin noted that he referred to appellant's statement regarding his employment and stated that appellant's degenerative changes, as shown on the September 12, 2006 MRI scan, were more severe than was normal for his age, but did not detail the basis for that conclusion or identify a normal baseline for an individual of appellant's age. He attributed appellant's condition to "many years of heavy physical and repetitive work" performed by appellant as described in appellant's statement but did not specifically identify particular tasks or other factors of employment or explain precisely how they caused or aggravated appellant's condition. The Board has previously held that a medical report which simply restates appellant's complaints that he or she hurts too much to work without objective signs of disability being shown does not constitute a rationalized medical opinion sufficient to establish causal relationship.¹⁰ Because Dr. Zamarin merely noted that appellant had provided a statement describing his work conditions, without making specific findings of his own, identifying factors of employment and relating them to his condition and supporting his conclusions with reasoned explanation, the Board finds that Dr. Zamarin's March 12, 2007 report is insufficiently rationalized to establish a

⁷ *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

⁸ *John W. Montoya*, 54 ECAB 306 (2003).

⁹ *Judy C. Rogers*, 54 ECAB 693 (2003).

¹⁰ *John L. Clark*, 32 ECAB 1618; *see also William A. Archer*, 55 ECAB 674 (2004); *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

causal relationship between appellant's diagnosed condition and his employment factors. Appellant also submitted a May 9, 2007 work capacity evaluation from Dr. Zamarin, but this document did not further address causal relationship.¹¹

Appellant also submitted several other reports, including a September 12, 2006 lumbar MRI scan from Dr. Sortur, August 31 and December 5, 2006 notes from Ms. Sipala, a nurse practitioner, and a December 1, 2006 report from Ms. Mathwich, a physical therapist. The MRI scan report is diagnostic in nature and does not address causal relationship. As noted, a medical report that does not contain an opinion on causal relationship is of no probative value on that issue.¹² Because Ms. Sipala is a nurse and Ms. Mathwich is a physical therapist, their reports are not probative on the issue of causal relationship. The Board has held that causal relationship is a medical question that can be resolved only by rationalized medical opinion evidence.¹³ Because neither Ms. Sipala, a nurse practitioner¹⁴ nor Ms. Mathwich, a physical therapist,¹⁵ is a physician pursuant to the Act,¹⁶ neither is competent to render a medical opinion. Consequently, their reports are not probative on the medical issue of causal relationship.

The Office referred appellant to Dr. Smith for a second opinion. He reviewed the evidence and conducted a thorough physical examination. Dr. Smith found satisfactory spinal range of motion and no soft tissue abnormalities, noting that appellant's MRI scan also revealed no soft tissue abnormalities. He noted that Dr. Bands and Dr. Zamarin also recorded essentially normal findings on physical examination and that appellant's MRI scan results were consistent with arthritis, which was normal for appellant's age. Dr. Smith opined that appellant had longstanding degenerative disc disease, which was not work related. The Board finds that Dr. Zamarin's report was well reasoned and explained his conclusion, which was based on the lack of physical examination findings and on his reading of appellant's MRI scan, that appellant's condition was an age-related, degenerative condition and was not related to his employment. Dr. Zamarin found no basis on which to attribute any diagnosed condition to appellant's employment.

On appeal, appellant asserts that the Office should have found a conflict in the medical evidence between Dr. Zamarin and Dr. Smith and referred him for an independent medical examination to resolve the conflict. The Board notes that a simple disagreement between two physicians does not, in and of itself, establish a conflict in the medical evidence. To constitute a

¹¹ See, e.g., *Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

¹² *Id.*

¹³ *Steven S. Saleh*, 55 ECAB 169 (2003).

¹⁴ *Paul Foster*, 56 ECAB 208 (2004).

¹⁵ *Jennifer L. Sharp*, 48 ECAB 209 (1996); *Thomas R. Horsfall*, 48 ECAB 180 (1996); *Barbara J. Williams*, 40 ECAB 649 (1988).

¹⁶ See 5 U.S.C. § 8101(2). This subsection defines the term "physician." See also *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

conflict in medical opinion, the opposing physicians' reports must be of virtually equal weight and rationale.¹⁷ Here, Dr. Smith provided a well-reasoned opinion explaining that in light of appellant's essentially normal physical examination findings and his age-related changes as shown on the MRI scan, his condition did not appear to be work related. Dr. Zamarin, however, did not clearly identify employment factors to which he attributed appellant's condition nor did he explain precisely how any such factors caused or aggravated a diagnosed. Therefore, Dr. Zamarin's and Dr. Smith's reports are not of virtually equal weight and rationale and the Office properly found no conflict in the medical evidence.

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he developed an occupational disease in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the August 10 and May 14, 2007 and December 18, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 20, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹⁷ *John D. Jackson*, 55 ECAB 465 (2004).